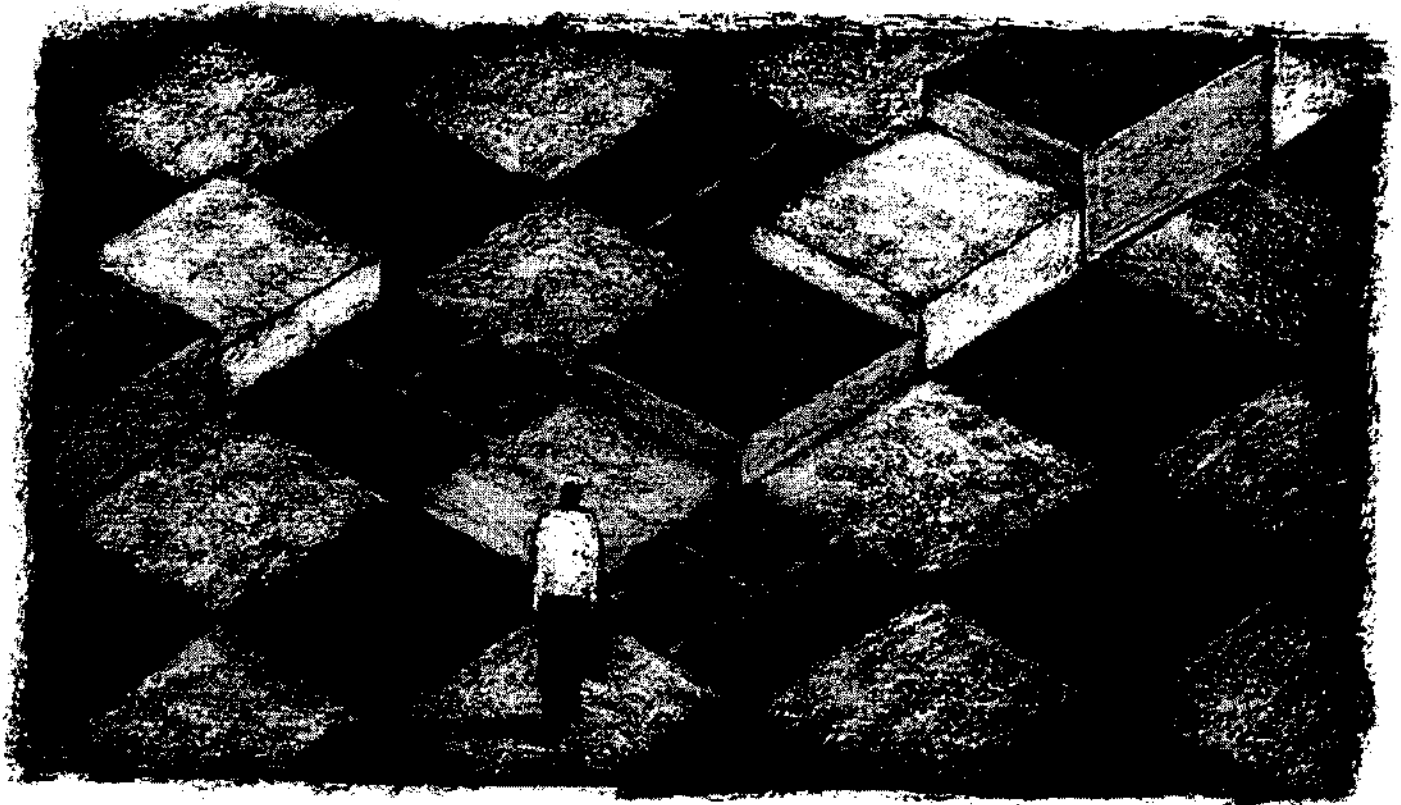


Piling on the Constitution to Avoid Governing

A Barrage of Amendments

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As many as seven separate constitutional amendments may be considered in the 105th Congress—the most in a single Congress since the First Congress adopted the Bill of Rights. These proposals on balancing the budget, term limits, flag desecration, victims' rights, school prayer, supermajority votes to increase taxes, and elimination of automatic birthright citizenship were either considered last Congress or identified as priorities in the Republican platform.

They all have a certain superficial appeal. After all, who among us supports perpetual deficit spending or would condone those who burn the nation's flag? And what legislator doesn't want to give victims of crime a greater role in the criminal justice process? But each of these proposed constitutional amendments also has far more wide-ranging and dangerous ramifications than may be immediately apparent.

FOUR STANDARDS

Before we approve any amendment to the Constitution, we should assure ourselves that the amendment is justified, will not have unintended and adverse consequences, is readily understood and enforceable, and is consistent with our constitutional values. When measured against these standards, all the amendments expected to be considered this Congress come up well short.

1. Is there a compelling and clear need to amend the Constitution?

Although there is near unanimous support among legislators for providing victims of crime with a more meaningful role in the criminal justice process, it's not clear that the proposed victims' rights amendment is the most appropriate way to identify and protect those rights. Twenty-nine states have already altered their constitutions to specifically protect victims, and all of the remaining states as well as the federal government have adopted some form of statutory victims' rights protection.

So why the need to alter the nation's founding charter? For some changes, a constitutional amendment (rather than mere statutory reform) is needed to overcome a supposed conflict between a victim's state-granted right to attend and participate in trial proceedings and the defendant's constitutional right to due process and a fair trial, that is, the right to be confronted with witnesses who are not biased as a result of having considered testimony offered at trial by other witnesses.

But to date, no Supreme Court or other federal appellate decision has found any such conflict to exist.

Others argue that a constitutional amendment is necessary to establish a minimum federal floor of victims' rights. But if this is the case, it's unclear why the amendment permits the states to define many of the types of crimes subject to the new constitutional protections or to carve out wide-ranging "public safety" exceptions to the entire amendment. As a result, the victims' rights amendment would result in a patchwork of varying state laws, just as we have today.

Still others believe a constitutional amendment is needed to serve as a symbol of our concern for victims and their families. Although this argument has a certain emotional appeal, it's a justification without limitation. If symbolism is the principal rationale for the victims' rights amendment, why aren't we also seeking a constitutional amendment protecting such important objectives as good education or a clean environment?

The proposed flag desecration amendment also strikes me as very much of a "solution in search of a problem." Amendment advocates can point to no outbreak of disrespect for the flag in recent years. Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to theft, vandalism, and trespassing. And any remaining gaps can be cured through ordinary legislation that seeks to prohibit flag desecration based on the "fighting words" exception to the First Amendment, without resorting to the first-ever modification to the Bill of Rights. By propounding a constitutional amendment under these circumstances, we succeed only in trivializing the Constitution and offering those who disparage the flag their ultimate victory—the elevation of a symbol of freedom over freedom itself.

2. Is the amendment likely to have any adverse, unintended consequences?

The birthright citizenship proposal illustrates the problems that can arise from the unintended consequences of constitutional amendments. The purpose of the amendment—reducing the incentives of undocumented aliens to cross our border illegally—is understandable. But the cost—repealing the 14th Amendment's birthright-citizenship clause—is unacceptable.

The birthright-citizenship clause was specifically intended to overturn the apartheid-like *Dred Scott* decision (1857), which excluded African-Americans born in the United States from citizenship. The concern then—as it should be now—is that tying the citizenship status of children to their parents creates a permanent underclass with no legal rights and no allegiance to this country. Children born in the United States would be denied access to medical care and unable to report legal abuses to the authorities for fear of deportation. This is why the late Barbara Jordan, in her last statement as chairwoman of the Immigration Commission, declared, "To deny birthright citizenship would derail [the] engine of American liberty."

The balanced budget amendment would also carry unacceptable costs, not the least of which is its failure to protect the Social Security trust fund. As House Judiciary Chairman Henry Hyde (R-Ill.) acknowledged last Congress: "If you exclude [from] receipts the revenues that are received by the Social Security System from computing the total revenues of the government, if you will take that out of the equation, then the cuts that are necessary to reach a balanced budget become draconian." Since the balanced budget amendment introduced this Congress included no carve-out for social security, this means that when the baby boomers retire, we'll have no funds available to pay their Social Security benefits—the surplus will already have been used to balance the budget. In other words, there will be a constitutional mandate to balance the budget on the backs of our senior citizens.

The balanced budget amendment would also mandate what economists refer to as pro-cyclical economic behavior. When the next recession arrives and tax revenues fall, we will be forced to raise taxes or cut entitlement payments to balance the budget. This could lead to a downward cycle of economic contraction, as was the case in the early 1930s when President Herbert Hoover vainly tried to balance the nation's books in the face of the Depression.

3. Is the amendment easily understood and enforceable?

Another problem presented by the balanced budget amendment is that its terms are both unclear and unenforceable—in effect providing for a constitutional "right" with no meaningful remedy. The terms of the amendment—requiring that "outlays" do not exceed "receipts"—are easily subject to evasion. One obvious dodge is selling off federal assets and leasing them back to generate sufficient cash to temporarily eliminate a budget shortfall. Moreover, in the same way states avoid their own balanced budget requirements by borrowing through "special purpose" capital funds, the federal government could paper over its own red ink by taking certain expenditures "off budget" (e.g., costs incurred by government corporations, such as the Federal Deposit Insurance Corp. and Amtrak).

The balanced budget amendment also fails to specify any mechanism to ensure that its provisions are faithfully observed. While the most obvious recourse for enforcement is the judiciary, such a massive transfer of power would invariably be accompanied by pervasive legal confusion. Among other things, the amendment does not specify whether the so-called political question doctrine—which restrains the courts from inappropriate interference with other branches of the government—would permit unelected judicial officials to raise taxes and cut benefits to balance the budget. The amendment also fails to provide any indication of the type of plaintiffs who would be able to show sufficient injury to establish legal standing to challenge non-compliance with the amendment. For example, it's not clear whether an ordinary taxpayer would suffice, or it would be necessary for a legislator or even the entire House or Senate to bring suit to enforce the amendment's terms.

The proposed constitutional amendment requiring a two-thirds majority vote to increase taxes would also be problematic from an enforcement perspective. There can be no doubt that litigation would arise over the meaning of "increase in internal revenue"—a new term of art with no known antecedent or supporting legislative history. Also unclear is whether the amendment would apply to a bill that reduces tax revenues in some years, but increases them in other years, or a user fee hike that substitutes for a tax increase. Similarly, the meaning of the amendment's exception for *de minimis* tax increases is fraught with peril—how does one assess the purpose of such a term in the context of a more than \$1.5 trillion federal budget? (Our experience with a similar House rule requiring a 60 percent vote to increase taxes is not promising—on four occasions last Congress, Republicans chose to ignore their own internal rule and pass tax increases based on only simple majorities.)

4. Is the amendment consistent with the rest of the Constitution and, in particular, the Bill of Rights?

Even if a particular constitutional proposal meets all of the criteria noted above, it should not warrant congressional approval if it's inconsistent with some other, more fundamental, constitutional principle. For example, the term limits amendment, by denying voters the opportunity to vote for the person they believe is most qualified to serve as their representative or senator, undercuts the very foundation of our democracy—majority rule.

There is little difference between forcing citizens to vote for a particular candidate for office and denying them the ability to vote for that same person. This fundamental truth was recognized by our founders when they rejected efforts to provide for term limits in the form of mandatory "rotations in office" by federal legislators.

The most likely effect of term limits is the transfer of power from elected members of Congress with knowledge of the legislative process to legislative staff, federal bureaucrats, and corporate lobbyists. Instead of a legislature more sensitive to the needs of the voters, we could end up with representatives more interested in finding a job after their term expires than responding to the long-term needs of their constituents.

The proposed "religious liberty" amendments also pose a grave risk to our constitutional values. Last Congress, the House Judiciary Committee held six days of hearings on two constitutional proposals—one offered by Rep. Ernest Istook (R-Okla.) designed to protect "student-sponsored prayer," and another offered by Rep. Hyde mandating that the government not "deny benefits to or otherwise discriminate against" any religious group.

Both amendments would significantly undermine the First Amendment establishment clause, the cornerstone of separation of church and state in this country. Although the Istook amendment purports to prevent the United States or any state from composing any "official prayer" or "compel[ling] joining in prayer," it would not limit the coercive authority of the schools or teachers themselves, who could elect to begin every day with the delivery of a sectarian prayer or other religious observance before a captive audience of children. And since the amendment includes no time or place limitation, any student gathering could become a competitive grounds for students of all faiths to organize and present their religious views.

Unless we're convinced of the need for change, we should give our current political system the benefit of the doubt.

The Hyde constitutional proposal—which would force the government to fund religion in the same manner it funds secular activities—is equally disruptive to the cause of religious freedom. By paving the way for mandatory public support of parochial schools and other religious causes, the amendment would threaten the existence of the resource-starved public school system. In doing so, the amendment would violate our taxpayers' own religious liberties, by requiring them to fund someone else's religion. The amendment would also trigger competition among religious groups for limited public funds, forcing the government to make difficult choices regarding monetary allocations. The inevitable result would be government sponsorship of majority religious faiths, to the detriment of minority faiths and those who practice no religion—the precise opposite of the intent of the establishment clause.

AVOIDANCE MECHANISMS

Given the many clear-cut problems with these constitutional amendments, why have they enjoyed so much congressional support? For too many, amending the Constitution merely serves as an excuse for avoiding the more difficult decisions of day-to-day governing. How else can we explain legislators who line up to support deficit-busting tax cuts while hypocritically voting for a balanced budget amendment? Others are unable to gather the will to limit the power of entrenched incumbents by reforming the campaign finance laws, but have no difficulty pushing for a term limits amendment which, even if adopted, would not apply to any current incumbents for as many as 19 years. And instead of working on finding the funds to place more "cops on the beat" to combat crime, many in Congress prefer to focus their time and efforts on the largely symbolic victims' rights amendment.

There is very little in the Constitution which prevents Congress from achieving its policy goals represented by these amendments, all that is needed is sufficient political courage. The Constitution has provided us with the most enduring and successful democracy in history, and unless we're absolutely convinced of the need for change, we should give our current political system the benefit of the doubt. ■

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